BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN BLACKMORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,283
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Pamela J. Fuller's October 14, 1999, Decision. The Appeals Board heard oral argument on February 11, 2000.

APPEARANCES

Claimant appeared by his attorney, Randy S. Stalcup of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kerry McQueen of Liberal, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Decision.

ISSUES

This claim for an April 18, 1997, work-related accident was consolidated for litigation purposes with a claim for a February 20, 1994, work-related accident which was assigned Docket No.195,810. The Administrative Law Judge, however, entered two separate Decisions. Accordingly, the claim for the February 20, 1994, accident has been reviewed by the Appeals Board in a separate Order under Docket No. 195,810.

On April 18, 1997, claimant and another maintenance employee of respondent were repairing a conveyor belt when claimant suffered an injury to his low back. Respondent

provided claimant with medical treatment and eventually claimant's low back required surgical intervention. After surgery and claimant's release to return to work with permanent restrictions, respondent was unable to accommodate the permanent restrictions and placed claimant on a long-term leave of absence (LTLOA). Claimant was then terminated from his employment with respondent for violating the collective bargaining agreement because he worked for another employer while on the LTLOA. Because of this termination, the Administrative Law Judge limited claimant's award to permanent partial disability benefits based on the stipulated nine percent permanent functional impairment rating.

Claimant appeals and contends he is entitled to a much larger award based on a work disability. Claimant argues the respondent wrongfully terminated him. Therefore, claimant contends respondent failed to offer claimant a job within his permanent work restrictions. After the termination, claimant made a good faith effort to find appropriate employment but was unable to do so. According, claimant asserts he is entitled to a work disability award.

Respondent, on the other hand, contends the Administrative Law Judge's Decision should be affirmed. Respondent contends claimant was terminated because he violated the collective bargaining agreement that prohibited an employee from performing any work for any person, firm, or who was self-employed while on any type of leave of absence. Respondent argues, if claimant had remained on the LTLOA, the respondent would have returned claimant to work within his permanent restrictions at a comparable wage. Therefore, respondent asserts that claimant's permanent partial general disability is limited to the stipulated permanent functional impairment.[1]

Nature and extent of disability is the single issue before the Appeals Board for review. Specifically, is claimant entitled to a work disability award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board finds the Decision should be modified to award claimant a work disability.

FINDINGS OF FACT

1. On the date of claimant's accidental injury, April 18, 1997, claimant had been employed by the respondent for over 21 years.

2. Claimant suffered an injury to his low back while working with another maintenance employee repairing a conveyor belt.

---

[1] *See* K.S.A. 1996 Supp. 44-510e(a).

3. Before the April 18, 1997, accidental injury, claimant had sustained injuries to his low back while working for the respondent on two other occasions, November 24, 1992, and February 20, 1994.

4. As a result of the November 24, 1992, low-back injury, claimant settled his workers compensation claim for workers compensation benefits with respondent for a lump sum amount of $11,400.00. The settlement was based on treating physician Dr. Aly Mohsen's eight percent permanent functional impairment rating. Dr. Mohsen had diagnosed claimant with ligamentous instability of the lumbar spine, other various lumbar spine abnormalities, and trochanteric bursitis. The doctor returned claimant to full duty with permanent restrictions of lifting limited to 40 pounds constantly, 60 pounds frequently, and 80 pounds occasionally.

5. Claimant suffered another injury to his low back at work while welding on February 20, 1994. Respondent provided medical treatment for this injury primarily through physical medicine and rehabilitation physician Blake C. Veenis, M.D. Dr. Veenis first saw claimant on March 31, 1994. He diagnosed claimant with degenerative disc disease at L5-S1, lumbar strain, and secondary low-back pain. The doctor provided the claimant with conservative treatment which included medication, physical therapy, ultrasound, and placed claimant on an exercise program.

Dr. Veenis released claimant from treatment on June 8, 1994. The doctor prescribed a home exercise program and assessed claimant with an eight percent permanent functional impairment. Because the eight percent rating was the same rating as Dr. Mohsen had determined after claimant's 1992 injury, Dr. Veenis concluded claimant had not sustained any additional functional impairment as the result of the February 20, 1994, accident.

But, Dr. Veenis did impose more restrictive work limitations. Dr. Veenis restricted claimant to frequent lifting of 10 pounds, occasional lifting of 30 pounds, and no lifting above 30 pounds. Claimant was also limited to occasional bending, stooping, and twisting activities. He was instructed to wear a lumbosacral support with metal stays while working and was further instructed to continue using a TENS unit on an as needed basis.

After claimant returned to work, respondent again had Dr. Veenis examine claimant on December 22, 1994. The doctor found claimant unchanged from his June 8, 1994, examination. Dr. Veenis' permanent functional impairment rating of eight percent remained the same along with the same permanent restrictions, except for one additional restriction of limiting claimant's tool belt weight to 10 pounds or recommending that he carry his tools in a bag.

6. After the April 18, 1997, accident, claimant was able to complete the shift, but because of the increasing pain and discomfort, the next day he went to a local hospital emergency room for treatment.

7. Claimant was then seen by a local physician, David Edwards, M.D., who referred claimant to neurosurgeon Jeffrey D. Cone, M.D., located in Amarillo, Texas.

8. Dr. Cone first examined claimant on June 17, 1997. He took claimant off work and ordered claimant to undergo a lumbar myelogram with post CT scan. The myelogram and the CT scan found claimant with a herniated nucleus pulposus at L4-L5 and L5-S1. Dr. Cone first treated claimant conservatively with physical therapy and medication. But claimant did not improve and because of the herniated discs claimant was scheduled for surgery.

On October 8, 1997, Dr. Cone performed a left L4-L5 and L5-S1 hemilaminectomy with excision of the herniated nucleus pulposus. After surgery, claimant was placed in rehabilitation therapy and work hardening. Dr. Cone released claimant at maximum medical improve on February 17, 1998, but he referred claimant to physical medicine and rehabilitation physician Pedro A. Murati, M.D., for assessment of claimant's permanent functional impairment.

9. Before claimant was examined by Dr. Murati, he underwent a functional capacity evaluation (FCE) which was completed on March 4, 1998. The test was determined valid in all categories by the evaluator.

10. Dr. Murati examined and evaluated the claimant on March 24, 1998. The doctor's impression was status post left L4-L5 and L5-S1 discectomy, hemilaminectomy, foraminotomy, chronic lumbar strain, and bilateral trochanteric bursitis. He assessed claimant with a 27 percent whole body permanent functional impairment based on the AMA Guide to the Evaluation of Permanent Impairment, Fourth Edition. The doctor determined that 16 percent of the impairment rating was preexisting. After the preexisting impairment was subtracted, the doctor concluded claimant had sustained a 13 percent permanent functional impairment as the result of the April 18, 1997, accident.

Dr. Murati's permanent restrictions were imposed based on the March 4, 1998, FCE. He interpreted those restrictions as limiting claimant to a maximum lift of 10 pounds with no bending, stooping, or crawling. Reaching above shoulder level, climbing, squatting, and kneeling could be performed only occasionally. Walking, sitting, and standing could be performed frequently, if the activities were alternated.

11. Orthopedic surgeon C. Reiff Brown, M.D., was requested by the Administrative Law Judge to perform an independent medical examination of claimant. On January 19, 1999, Dr. Brown evaluated and examined claimant. He took a history from claimant, reviewed claimant's previous medical treatment records, and performed a physical examination of claimant. His impression was claimant had degenerative disc disease of the lumbar spine, had suffered herniations of the lumbar spine in the past, and had aggravated, strained, or sprained his lower back at work on February 20, 1994, and April 18, 1997.

Dr. Brown assessed claimant with an 11 percent whole body functional impairment after the February 20, 1994, accident with eight percent preexisting from the November 24, 1992, accident based on Dr. Veenis' opinion. The doctor assessed claimant with a three percent permanent functional impairment as an additional impairment for the February 20, 1994, accident. He then opined there was an additional 10 percent permanent functional impairment for the April 18, 1997, accident making a total of a 21 percent overall rating after the three separate work-related accidents. The 10 percent additional functional impairment rating was based on the AMA Guides, Third Edition (Revised). But Dr. Brown opined that the functional impairment percentage would have been the same if he had based the opinion on the AMA Guides, Fourth Edition.

12. After claimant was examined and evaluated by Dr. Murati, he returned to the respondent with Dr. Murati's permanent work restrictions. At that time, the respondent determined it could not accommodated claimant's work restrictions. Therefore, on March 25, 1998, claimant was placed on LTLOA. The respondent's policy was that a worker could remain on LTLOA for a period of 18 months and during that period, he would receive his health benefits but no other compensation.

13. The collective bargaining agreement between the respondent and the union contained a clause that basically prohibited an employee on any type of leave of absence from working for any other person, firm, or be self-employed. An employee on leave of absence and who performs work as prohibited by this clause shall be deemed to have voluntary quit their employment.[2] In April and May of 1998, claimant worked two Saturdays at the Foss Ford car agency as a greeter earning $30 to $35 each Saturday.

14. Respondent became aware that claimant worked the two Saturdays for Foss Ford car agency while on LTLOA. In a letter dated June 2, 1998, respondent's personal director, George Hall, notified claimant that his employment had been terminated in accordance with the collective bargaining agreement, Leave of Absence, Section 8.

15. Claimant testified he was not aware of the clause prohibiting him from working while on a leave of absence. But claimant had been a union steward for over a year. Additionally, respondent placed into evidence leave of absence request forms that claimant had signed for National Guard Camp that noted an employee who was on a leave of absence and worked for another employer or person was subject to termination.

16. Claimant testified and placed into evidence some ten pages listing employers he contacted in an effort to find appropriate employment from March 25, 1998, through December 1998. The only employment he was able to find during this period was the two days he had worked for Foss Ford car agency and he worked for his nephew, Ernie Diaz, repairing and selling Kirby vacuum cleaners and accessories.

---

[2]Deposition of George Hall, September 17, 1999, Claimant's Exhibit 1, p. 13.

Claimant worked from September 18, 1998, through February 27, 1999, for his nephew earning a total of $966.00 plus $30.00 worth of sweeper bags for a total of $996.00 of earnings.

17. Because claimant was unable to find appropriate employment, he enrolled in the local community college in an effort to obtain a two-year degree that would enable him to substitute teach. Claimant started community college in January 1999. On the date of the regular hearing, June 22, 1999, claimant had completed seven hours toward an associate degree.

18. Claimant, however, when he testified by deposition on September 17, 1999, indicated he was no longer enrolled in the substitute teaching degree program at the community college. Claimant explained he decided not to complete the substitute teaching course because he was afraid he was not able to satisfactorily complete the required algebra course and he was not able to obtain a tuition grant.

Instead, claimant had enrolled at a local vocational technical school in a two-year mechanical and technical drafting course. The vocational technical school program was a full day, five day a week program. Claimant testified he had not sought employment since he had started the community college program in January 1999. Furthermore, he testified he was not going to look for employment until he had completed the two-year drafting program at the technical school.

19. Claimant applied for Social Security Disability Benefits on March 27, 1998. He received notification on June 20, 1998, of his entitlement to the benefits retroactive to December 1997. At the time of his September 17, 1999, deposition, claimant was still receiving monthly Social Security Disability Benefits.

20. At claimant's attorney's request, claimant was interviewed by vocational expert Karen Crist Terrill on April 7, 1998. As a result of the interview, Ms. Terrill completed a list of job tasks claimant had performed in jobs he was employed in the 15 years preceding his April 18, 1997, accident. Those job tasks were all related to the jobs he had performed for the respondent except for a part-time teaching job claimant had performed for a few months at the local vocational technical school.

21. Drs. Cone, Murati, Veenis, and Brown all reviewed the job task list prepared by Ms. Terrill. Utilizing the FCE permanent work restrictions, both Dr. Cone and Dr. Murati reviewed the list of job tasks and opined that claimant could no longer perform four of the eight job tasks and if claimant was required to stand for the total of eight hours while teaching then he also could not perform the teaching job.

22. Dr. Brown and Dr. Veenis utilized the permanent restrictions they imposed on the claimant and opined that claimant had only lost the ability to perform one of eight job tasks.

23. During Ms. Terrill's deposition, she was requested to give an opinion on claimant's current ability to perform and earn wages in the open labor market. She testified that claimant retained the ability to earn from $6.00 to $7.00 per hour.

24. The parties stipulated that the April 18, 1997, accident resulted in claimant sustaining a nine percent permanent functional impairment in addition to the permanent functional impairments attributed to his November 24, 1992, and February 20, 1994, injuries.

CONCLUSIONS OF LAW

1. In proceeding under the Workers Compensation Act, the claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and to prove the various conditions on which that right depends.[3]

2. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 1996 Supp. 44-510(e) also specifies that a claimant is not entitled to permanent partial general disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

4. The wage component of the work disability test is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in a work disability calculation.[4]

---

[3] *See* K.S.A. 1996 Supp. 44-501(a) and K.S.A. 1996 Supp. 44-508g(g).

[4] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

5. Even if no work is offered, claimant must show that he or she made a good faith effort to find appropriate employment. If claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.[5]

6. Under certain circumstances, an injured worker who respondent returns to work in an accommodated position at a comparable wage and is then terminated for reasons unrelated to his work injury is limited to an award based on his functional impairment rating.[6]

7. But the Appeals Board concludes, under the circumstances in this case, claimant's termination was not the result of bad faith or any wrong doing on the part of the claimant. The leave of absence clause contained in the collective bargaining agreement that prohibits an injured worker from performing any work within his permanent restrictions other than with the respondent while on a leave of absence is unreasonable and should not disqualify claimant from his entitlement to a work disability.

8. An injured worker in a workers compensation case has a duty to make a good faith effort to find post-injury appropriate employment.[7] In this case, after respondent could not accommodate his permanent restrictions, claimant made a good faith effort to find post-injury employment. While making that effort, he worked two days and was terminated as a result of the effort.

The Appeals Board concludes an employer cannot expect an injured worker to not seek post-injury employment while on a leave of absence when the injured worker is obligated to do so under the Workers Compensation Act. Furthermore, the Appeals Board concludes it is unreasonable for an employer to expect an employee not to seek employment in an effort to support himself and his family while not receiving support from the employer while on leave of absence.

9. After claimant was terminated, respondent argues that it would have accommodated claimant's restrictions as imposed by either Dr. Brown or Dr. Veenis, even though respondent did not offer claimant such accommodated employment before he was terminated.

10. The Appeals Board concludes, based on claimant's testimony and the list of employers claimant admitted into evidence, claimant made a good faith effort to find appropriate employment from March 25, 1998, through December 31, 1998. Thereafter, because claimant was unable to find employment, he first attempted to obtain a substitute

---

[5] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *See* Ramirez v. Excel Corp., 26 Kan. App.2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999).

[7] Copeland 24 Kan. App.2d at 320.

teaching degree and then was attending a vocational school in an effort to obtain training to qualify for a job of a draftsman. This likewise constitutes good faith.[8]

11. The Appeals Board concludes there is no good reason to give greater weight to the job task lost opinions of any one of the four doctors that testified in this case. The Appeals Board also finds it is reasonable to conclude that claimant would have been able to perform the job tasks of teaching in the technical school by standing and sitting at intermittent intervals. Accordingly, the Appeals Board finds that Dr. Cone and Dr. Murati's opinion on the number of job tasks claimant no longer could perform was four of the eight job tasks for a 50 percent job task loss. Both Dr. Brown and Dr. Veenis found claimant no longer could perform one of the eight job tasks for a 12.5 percent job task loss. Giving equal weight to both of those job task loss percentages, the Appeals Board finds that claimant has a 31.25 percent job task loss.

12. In regard to the claimant's wage loss, the Appeals Board concludes, after claimant's April 18, 1997, injury, he received 41 weeks of temporary total disability benefits and thereafter made a good faith effort to find appropriate employment until he was employed by his nephew selling and repairing Kirby vacuum cleaner on September 18, 1998. Claimant averaged $42.77 per week while working for his nephew. After February 27, 1999, claimant was not looking for work but was enrolled in an educational program in an effort to obtain a skill to find appropriate employment within his permanent work restrictions.

The Appeals Board concludes, following claimant's 41 weeks of temporary total disability benefits, claimant is entitled to a 100 percent wage loss until he started working for his nephew on September 18, 1998. During the 23.29 weeks claimant worked for his nephew, he had an average weekly wage loss of 94 percent.[9] Thereafter, the Appeals Board concludes claimant has a 100 percent wage loss while he is attending school in an effort to develop a skill to find appropriate employment.

13. K.S.A. 1996 Supp. 44-501(c) provides if an injured worker's disability is caused by an aggravation of preexisting condition, then any award of compensation shall be reduced by the amount of permanent functional impairment determined to be preexisting.

The Appeals Board concludes, based on Dr. Brown's opinion, that claimant, as a result of injuries he sustained on November 24, 1992, and February 20, 1994, has a preexisting an eleven percent permanent functional impairment. Therefore, claimant's work disability should be reduced by his eleven percent preexisting functional impairment.

---

[8] *See* Hanser v. Sirloin Stockade, WCAB Docket No. 216,417 (August 1999).

[9] The parties stipulated to a pre-injury average weekly wage of $719.65. Comparing $719.65 to the $42.77 per week claimant earned while employed by his nephew equals a 94 percent wage loss.

14. After claimant's April 18, 1997, accident, the Appeals Board concludes claimant is entitled to 41 weeks of temporary total disability compensation[10] followed by 23.29 weeks at a 51.63 percent work disability[11] and followed by 189.22 weeks at a 54.63 percent work disability.[12]

15. The Appeals Board adopts the parties' stipulation that the April 18, 1997, injury resulted in a nine percent functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's October 14, 1999, Decision should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John Blackmore and against the respondent, National Beef Packing Company, and its insurance carrier, Wausau Underwriters Insurance Company, for an accidental injury which occurred April 18, 1997, and based upon an average weekly wage of $719.65.

Claimant is entitled to 41 weeks of temporary total disability compensation at the rate of $338.00 per week or $13,858.00, followed by 23.29 weeks of permanent partial disability compensation at the rate of $338.00 per week or $7,872.02 for a 51.63% permanent partial general disability, followed by 189.22 weeks of permanent partial disability compensation at the rate of $338.00 per week or $63,956.36 for a 54.63 percent permanent partial disability, making a total award of $85,686.38.

As of June 30, 2000, there is due and owing claimant 41 weeks of temporary total disability compensation at the rate of $338.00 per week or $13,858.00, followed by 23.29 weeks of permanent partial disability compensation at the rate of $338.00 per week or $7,872.02 for a 51.63% permanent partial general disability, followed by 102.71 weeks of permanent partial disability compensation at the rate of $338.00 per week or $34,715.98 for a 54.63% permanent partial general disability, for a total of $56,446.00 which is ordered

---

[10]The parties stipulated that claimant was paid $13,858.00 of temporary total disability compensation. The claimant was entitled to the maximum weekly compensation rate of $338.00 per week. This computes to claimant receiving 41 weeks of temporary total disability benefits.

[11]The 51.63 percent work disability is found by averaging the 94 percent wage loss with the 31.25 percent task loss and reducing the resulting 62.63 percent by the 11 percent preexisting functional impairment.

[12]The 54.63 percent work disability is found by averaging the 100 percent wage loss with the 31.25 percent task loss and reducing the resulting 65.63 percent by the 11 percent preexisting functional impairment.

paid in one lump sum less any amounts previously paid. The remaining balance of $29,240.38 is to be paid at the rate of $338.00 per week, until fully paid or further order of the Director.

All remaining orders contained in the Decision are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Kerry McQueen, Liberal, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director